IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33442

RAYMOND J. MELTON,	)	**2008 Unpublished Opinion No. 578**
	)	
Petitioner-Appellant,	)	**Filed: August 5, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Gooding County. Hon. R. Barry Wood, District Judge.

Order summarily dismissing successive application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Ralph R. Blount, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Raymond J. Melton appeals from the district court's order summarily dismissing his successive application for post-conviction relief. Specifically, Melton asserts that he was provided with ineffective assistance of counsel during his initial post-conviction action and thus deprived of an adequate opportunity to present his claim of prosecutorial misconduct. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

Melton pled guilty to lewd conduct with a minor under the age of sixteen. The conduct Melton pled guilty to committing was having genital-to-anal contact with his daughter, who was ten years old at the time. The district court sentenced Melton to a unified indeterminate life term, with a minimum period of confinement of twenty-five years. Melton appealed, challenging only the reasonableness of his sentence. This Court affirmed Melton's judgment of conviction

and sentence in an unpublished opinion. *State v. Melton*, Docket No. 30348 (Ct. App. Aug. 13, 2004).

While Melton's direct appeal was still pending on April 19, 2004, he filed a pro se application for post-conviction relief. Among many other claims in the application, Melton alleged that the prosecutor committed misconduct by instructing Melton's daughter how to testify at the preliminary hearing and by violating many sections of the Idaho Code during different stages of the criminal proceedings. The district court appointed post-conviction counsel. Melton filed an amended application, which set forth additional claims but also incorporated by reference the allegations in the initial application.

The district court held an evidentiary hearing and ruled that Melton had not established that he was entitled to post-conviction relief on any of his claims. With regard to the claim that the prosecutor committed misconduct by coercing testimony, the district court ruled that Melton did not prove that any coercion prejudiced the outcome of the criminal proceedings. Melton filed a notice of appeal, and the district court appointed appellate counsel. During the pendency of the appeal, however, appellate counsel moved to withdraw on the basis that Melton did not have non-frivolous issues for appeal. The Supreme Court granted counsel's motion to withdraw. Melton did not file an appellate brief, and the Supreme Court dismissed the appeal. The remittitur was issued on March 22, 2006.

On April 18, 2006, Melton filed a successive application for post-conviction relief, wherein he requested appointment of counsel. The successive application alleged that post-conviction counsel had provided ineffective assistance at the evidentiary hearing by failing to call additional witnesses and present additional evidence in support of his claims. As relief, Melton sought another evidentiary hearing where he could present additional evidence. In support of the application, Melton also filed an affidavit and several exhibits, including two letters purportedly written by Melton's daughter. The state filed an answer and a motion for summary dismissal. Melton filed a response and again requested the appointment of post-conviction counsel. The district court summarily dismissed Melton's successive application without ruling on his request for appointment of counsel. Melton appeals.

II.

STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

III.

ANALYSIS

Melton asserts that the district court erred in summarily dismissing his successive application because the district court did not first rule on his request for post-conviction counsel and because his successive application raised a genuine issue of material fact. On appeal, Melton relies only on the allegation that post-conviction counsel provided ineffective assistance in presenting his prosecutorial misconduct argument at the evidentiary hearing by failing to call additional witnesses.[1]

We first address Melton's assertion that the district court erred in failing to rule on his request for post-conviction counsel prior to summarily dismissing his successive application. Melton asserts that his successive application and the supporting evidence raised the possibility of a valid claim of ineffective assistance of post-conviction counsel for counsel's failure to call additional witnesses at the evidentiary hearing in support of Melton's claim of prosecutorial misconduct.

If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case.

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[1] Melton has presented no argument supporting any of the other potential claims of ineffective assistance of post-conviction counsel raised by his successive application. A party waives an issue on appeal if either argument or authority is lacking. *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct. App. 1997). Thus, Melton has waived all post-conviction claims other than his claim of ineffective assistance of post-conviction counsel for failure to adequately present the prosecutorial misconduct claim at the evidentiary hearing.

Charboneau, 140 Idaho at 792, 102 P.3d at 1111; *Fox v. State,* 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997). The district court abuses its discretion where it fails to determine whether an applicant for post-conviction relief is entitled to court-appointed counsel before denying the application on the merits. *See Charboneau,* 140 Idaho at 793, 102 P.3d at 1112.

In determining whether to appoint counsel pursuant to Section 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Id.* In its analysis, the district court should consider that applications filed by a pro se applicant may be conclusory and incomplete. *See id.,* at 792-93, 102 P.3d at 1111-12. Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State,* 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). However, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau,* 140 Idaho at 793, 102 P.3d at 1112.

In *Swader v. State,* 143 Idaho 651, 653, 152 P.3d 12, 14 (2007), the district court erred by not applying the proper standard when denying Swader's motion for appointment of counsel. The Supreme Court held that the issue was whether such error was prejudicial. *Id.* The Supreme Court addressed the issue of whether Swader's motion for appointment of counsel should have been granted under the standard announced in *Charboneau*. Likewise, the issue in this case is whether the district court's error was prejudicial, and we must therefore determine whether Melton alleged facts that raise the possibility of a valid claim of ineffective assistance of post-conviction counsel.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of

reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceedings would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

There is no constitutionally protected right to the effective assistance of counsel in post-conviction relief proceedings. *Follinus v. State*, 127 Idaho 897, 902, 908 P.2d 590, 595 (Ct. App. 1995). Thus, such an allegation, in and of itself, is not among the permissible grounds for post-conviction relief. *See Griffin v. State*, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006); *Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987). Ineffective assistance of prior post-conviction counsel may, however, provide sufficient reason for permitting newly-asserted allegations or allegations inadequately raised in the initial application to be raised in a subsequent post-conviction application. *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008). *See also Palmer v. Dermitt*, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981); *Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999). Failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process. *Schwartz*, 145 Idaho at 189, 177 P.3d at 403; *Hernandez*, 133 Idaho at 799, 992 P.2d at 794. *See also Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996); *Mellinger v. State*, 113 Idaho 31, 35, 740 P.2d 73, 77 (Ct. App. 1987) (Burnett, J., concurring).

We must therefore determine whether Melton has raised the possibility of a valid claim that post-conviction counsel's alleged ineffective assistance at the evidentiary hearing deprived Melton of an adequate opportunity to present his prosecutorial misconduct claim. Melton asserts now, as he did at the post-conviction evidentiary hearing, that the only sexual contact he had with his daughter did not include genital-to-anal contact and thus did not amount to lewd conduct. Melton also appears to assert that the prosecutorial misconduct resulted in his daughter's false statement to police and testimony at the preliminary hearing as to the genital-to-anal contact. Melton seeks another evidentiary hearing where he may present additional evidence regarding prosecutorial misconduct.

Melton asserts that his affidavit and two letters purportedly written by the victim demonstrate that post-conviction counsel should have called several additional witnesses at the evidentiary hearing. One letter did not contain a date and one letter was dated October 7, 2005. In the undated letter, the victim asserted that, although an investigator instructed her to write that Melton sexually abused her fifteen to eighteen separate times, the abuse actually only occurred two to three times. The victim also wrote that the first two times Melton had all of his clothes on and the last time Melton wore his "under pants." In the letter dated October 7, 2005, the victim wrote that the prosecutor told her what to say on the witness stand and "some of it was true, but most of it was lies." The victim asserted that the prosecutor threatened to take her away from her mother and place her in a foster home if she did not testify as instructed.

The district court ruled that the two letters allegedly written by the victim did not establish that "the crux of her past statements or testimony were false." The district court relied on Melton's own testimony at the evidentiary hearing, wherein he testified that he "rubbed" his penis "up against her crack of her butt." The district court noted that Melton's testimony at the evidentiary hearing only contested his daughter's statements that Melton choked her mother and threw his daughter on the bed prior to sexually abusing her. The district court also noted that the charging document alleged that Melton committed lewd conduct by having genital-to-anal contact with his daughter, and Melton answered affirmatively when the district court asked at the change of plea hearing whether Melton had genital-to-anal contact with his daughter. The district court ruled that the letters did not negate Melton's admission. The district court also ruled that the two letters did not establish that post-conviction counsel should have been aware of the alleged false testimony at the time of the evidentiary hearing because the only dated letter contained a date after the evidentiary hearing.

Melton asserts that the district court erred by not accepting as true his averments regarding counsel's knowledge of the alleged perjury and misstatements at the time of the evidentiary hearing. However, even if we assume Melton could prove that post-conviction counsel was aware of additional evidence that would have proven the prosecutor committed misconduct, Melton must also prove that counsel's failure to present such evidence prejudiced Melton's ability to obtain post-conviction relief. Melton must therefore establish that there is a reasonable probability that he had a valid underlying claim of prosecutorial misconduct that would have entitled him to post-conviction relief. Because we conclude that Melton waived his

prosecutorial misconduct argument by failing to raise it during the underlying criminal proceedings, we conclude that Melton would be unable to demonstrate that post-conviction counsel's ineffective assistance prejudiced the outcome of the evidentiary hearing.

The entry of a valid guilty plea constitutes a waiver of nonjurisdictional defects in prior proceedings unless the same are preserved for appellate review either by entering a conditional guilty plea pursuant to I.C.R. 11(a)(2) or by moving to withdraw the guilty plea pursuant to I.C.R. 33. *See State v. Hosey*, 134 Idaho 883, 889, 11 P.3d 1101, 1107 (2000). Idaho appellate courts have applied this general rule to many different alleged defects. *See, e.g.*, *Hosey*, 134 Idaho at 889, 11 P.3d at 1107 (guilty plea waived challenge to mishandling of evidence on due process grounds); *State v. Green*, 130 Idaho 503, 505, 943 P.2d 929, 931 (1997) (guilty plea waived challenge to ruling on defendant's competence to stand trial); *State v. Book*, 127 Idaho 352, 354, 900 P.2d 1363, 1365 (1995) (guilty plea waived challenge to district court's instructions to grand jury); *Clark v. State*, 92 Idaho 827, 831-32, 452 P.2d 54, 58-59 (1969) (guilty plea waived challenge to sufficiency of evidence supporting recidivism enhancement charge); *State v. Wilhelm*, 135 Idaho 111, 116, 15 P.3d 824, 829 (Ct. App. 2000) (guilty plea waived double jeopardy argument); *State v. Dunlap*, 123 Idaho 396, 399, 848 P.2d 454, 457 (Ct. App. 1993) (guilty plea waived challenge to evidence admitted at preliminary hearing).

A guilty plea does not necessarily waive a challenge to a prosecutor's failure to disclose exculpatory evidence discovered by the defendant after entering the guilty plea. *See State v. Gardner*, 126 Idaho 428, 433 n.6, 885 P.2d 1144, 1149 n.6 (Ct. App. 1994). In such a case, the defendant must prove, in part, that he or she was prejudiced by demonstrating there is a reasonable probability that, but for the state's failure to produce the information, the defendant would not have entered the plea but instead would have insisted on going to trial. *Roeder v. State*, 144 Idaho 415, 418, 162 P.3d 794, 797 (Ct. App. 2007).

In the present case, Melton pled guilty after the alleged prosecutorial misconduct occurred. Melton does not assert that he was unaware of the misconduct when he pled guilty. Melton does not assert that this is a case where the state failed to disclose exculpatory evidence or that he would have insisted on going to trial but for the state's failure to produce such evidence. We must conclude, therefore, that Melton waived the opportunity to challenge the alleged misconduct when he entered an unconditional guilty plea.

Furthermore, even if we were to assume that Melton was unaware of the alleged instances of misconduct at the time he pled guilty and the state was responsible for Melton's lack of information, Melton should have raised these assertions of misconduct on direct appeal. The scope of post-conviction relief is limited. *Rodgers v. State*, 129 Idaho 720, 725, 932 P.2d 348, 353 (1997). An application for post-conviction relief is not a substitute for an appeal. I.C. § 19-4901(b). A claim or issue which was or could have been raised on appeal may not be considered in post-conviction proceedings. *Id.; Whitehawk v. State*, 116 Idaho 831, 832-33, 780 P.2d 153, 154-55 (Ct. App. 1989). The Idaho Supreme Court has declined to address post-conviction allegations of prosecutorial misconduct committed during trial proceedings in cases where the post-conviction applicant had the opportunity to present the prosecutorial misconduct argument in the direct appeal of the criminal case. *See Rodgers*, 129 Idaho at 725, 932 P.2d at 353; *Paradis v. State*, 110 Idaho 534, 545, 716 P.2d 1306, 1317 (1986).

The record demonstrates that Melton was aware of the facts supporting his allegation of improper prosecutorial coercion of the victim at the time of his direct appeal. Melton filed his initial pro se application for post-conviction relief on April 19, 2004, along with a supporting memorandum containing allegations that the prosecutor coerced the victim's statements to police and her testimony at the preliminary hearing. Because this Court did not issue its decision in Melton's direct appeal until August 13, 2004, Melton could have raised the prosecutorial misconduct argument in his direct appeal. Thus, Melton had an opportunity to challenge the alleged misconduct on direct appeal and may not raise the argument in post-conviction proceedings when he failed do so.[2]

Under these circumstances, we conclude that the prosecutorial misconduct claim was not properly raised in post-conviction proceedings and would not have entitled Melton to any post-conviction relief even if post-conviction counsel proved at the evidentiary hearing that the prosecutor acted improperly. Melton did not raise the possibility of a valid claim that post-conviction counsel's performance could have prejudiced the outcome of the evidentiary hearing

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[2] We note that in moving to withdraw as appointed post-conviction appellate counsel, Melton's counsel in the initial appeal asserted that Melton should have raised the "statutory" prosecutorial misconduct claims at trial and, if necessary, on direct appeal. Counsel who moved to withdraw in Melton's initial post-conviction appeal is the same as counsel representing Melton on this appeal.

as to the prosecutorial misconduct claim. Therefore, the district court's error in failing to rule on Melton's motion for appointment of post-conviction counsel did not prejudice Melton because he did not allege facts entitling him to appointment of counsel.

Finally, we address the district court's summary dismissal of Melton's successive application. Our conclusion that Melton did not raise the possibility of a valid claim with his allegation of ineffective assistance of post-conviction counsel necessarily compels a conclusion that the claim did not raise a genuine issue of material fact entitling Melton to another evidentiary hearing. An appellate court may affirm a lower court's decision on a legal theory different from the one applied by that court. *Matter of Estate of Bagley*, 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct. App. 1990). We therefore affirm the district court's summary dismissal of Melton's claim on the alternative basis that any deficiency in counsel's presentation of Melton's prosecutorial misconduct claim at the evidentiary hearing did not prejudice Melton because the claim could not be raised in Melton's post-conviction action.[3]

IV.

CONCLUSION

Melton's successive application did not raise the possibility of a valid claim of ineffective assistance of post-conviction counsel based on counsel's failure to present the testimony of additional witnesses on Melton's claim of prosecutorial misconduct. Thus, Melton was not entitled to appointed counsel in his successive post-conviction action, and the district court's error in failing to rule on Melton's request for counsel did not prejudice Melton. Additionally, Melton's claim of ineffective assistance of post-conviction counsel did not raise a genuine issue of material fact as to whether he was entitled to post-conviction relief. We therefore affirm the district court's order summarily dismissing Melton's successive application for post-conviction relief. No costs or attorney fees are awarded on appeal.

Chief Judge GUTIERREZ, **CONCURS.**

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[3] On appeal, the state raised several procedural arguments against Melton's successive application. Specifically, the state asserts that the prosecutorial misconduct claim is barred by the doctrine of res judicata when Melton already presented the claim at an evidentiary hearing, the successive application is an untimely motion for a new trial, the successive application is barred by I.C. § 19-4908, and the successive application is untimely pursuant to the one-year limitation period contained in I.C. § 19-4902(a). Because we hold that the sole claim asserted by Melton on appeal may not be raised in post-conviction proceedings, we do not express any opinion on the procedural arguments raised by the state.

Judge LANSING, **CONCURRING IN THE RESULT**

I do not join in the majority's conclusion that Melton's claim of prosecutorial misconduct is procedurally barred because it could have been raised in the appeal from his judgment of conviction. In my view, the issue could not have been presented in that appeal because it was not raised in the trial court during the criminal case, and hence there was no adverse ruling concerning prosecutorial misconduct that Melton could have challenged on appeal. I nevertheless join in affirming the summary dismissal of the present post-conviction action because Melton's own admissions in the record establish that his claim is frivolous.

The gist of Melton's claim is that some, but not all, of his daughter's testimony at Melton's preliminary hearing was false and that this false testimony was induced or coerced by the prosecutor and/or other state agents. Sometime after the preliminary hearing, Melton elected to plead guilty to the lewd conduct charge, thereby admitting that he committed lewd conduct with a minor under the age of sixteen by genital to anal contact with his twelve-year-old daughter. Thus, in order to show prejudice from the alleged prosecutorial misconduct, and a consequent right to post-conviction relief, Melton must demonstrate that his guilty plea was somehow caused or induced by his daughter's false testimony that was procured by the State. Melton's own testimony establishes that he cannot prove this element of his post-conviction claim. At the change of plea hearing, the district court read the charging information's allegations that Melton had genital to anal contact with his daughter, with the intent to arouse or gratify his sexual desires and then asked, "Is all that true?" Melton responded, "Yes, sir." Then, at the evidentiary hearing in Melton's first post-conviction action, under cross-examination by the prosecutor, Melton testified as follows:

> Q. Okay, and you were there [at the preliminary hearing]. You heard her say that you had touched her on her rectum--or I think the quote was on her butt with your penis?
> A. Yes, I did.
> Q. She told the truth, didn't she?
> A. Yes, she did.
> . . . .
> Q. Did she lie on the stand?
> A. Yes, sir.
> Q. How did she lie on the stand, Mr. Melton?
> A. When she was doing her last statement in the courtroom when she said that she seen me choke her brother. I have never--or choke her mother. I have never choked her mother or hurt her mother in any way.

Q. That was during the sentencing part?
A. Yes.
Q. And did I tell her to lie on the stand?
A. It was a letter that she didn't write, from what I understand.
Q. Okay, so that's when she lied. She didn't come in here and testify at sentencing, did she?
A. I did not try to stick it up her butt like you guys told me. I rubbed it up against her crack of her butt. I didn't put it up the part where she takes a s--- at. Excuse my way of putting that, sir.
Q. She didn't come into the courtroom and lie, as you previously have stated?
A. Well, that I threw her on the bed, yes, that was a lie. I did not throw my daughter on the bed. I sat her on the bed.

Thus, the only two points on which Melton contends his daughter's statements were untruthful were her assertion at sentencing that he had choked her mother and her statement that he threw her on the bed before he molested her. Neither of those statements has a bearing on Melton's guilt of the lewd conduct charge. He clearly admitted that his daughter's allegations of anal/genital contact were true. The only points upon which he contended his daughter testified falsely are inconsequential details.

When a post-conviction petitioner who pleaded guilty to a criminal charge seeks relief from the guilty plea on the ground of prosecutorial misconduct, he or she must show prejudice by demonstrating a reasonable probability that, but for the misconduct, the petitioner would not have entered the guilty plea but instead would have gone to trial. *Roeder v. State*, 144 Idaho 415, 418, 162 P.3d 794, 797 (Ct. App. 2007). Where essential elements of an applicant's claim for post-conviction relief are conclusively disproven by the record of prior proceedings, summary dismissal is appropriate. *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). In this case, the record of Melton's own admissions conclusively proves that he could not show prejudice resulting from the alleged prosecutorial misconduct. Because the allegedly coerced false statements are tangential or entirely irrelevant to the charged offense, they could not reasonably have been a factor in Melton's decision to plead guilty.

While the district court here should have addressed Melton's motion for appointment of post-conviction counsel before dismissing the application, the error was not prejudicial, for no appointed attorney could alter Melton's admissions already established in the record of the first post-conviction action. Accordingly, I join in affirming the district court's order summarily dismissing this action.